

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE NORTHERN DISTRICT OF CALIFORNIA

3 DARRYL WILLINGHAM,

4 No. C 11-1688 YGR (PR)

5 Plaintiff,

6 **ORDER OF DISMISSAL**

7 vs.

8 SHERIFF MICHAEL HENNESSEY, et al.,

9 Defendants.

10 /

11 Plaintiff, a former state prisoner and current "mental health patient probationer," dkt. 101 at  
12 3, filed a *pro se* civil rights action pursuant to 42 U.S.C. § 1983. His motion for leave to proceed *in*  
13 *forma pauperis* ("IFP") has been granted. Dkt. 26. Thereafter, he filed a first amended complaint  
14 ("FAC") and a second amended complaint ("SAC"). Dkts. 9, 52.

15 The Court dismissed Plaintiff's previous complaints with leave to amend.<sup>1</sup>

16 Pending before the Court is Plaintiff's Third Amended Complaint ("TAC"), alleging that  
17 Defendants violated his constitutional rights while he was incarcerated at the San Francisco County  
18 Jail ("SFCJ"). Dkt. 62. He seeks injunctive relief and monetary damages.

19 For the reasons outlined below, the TAC is DISMISSED without further leave to amend.

20 **BACKGROUND**

21 The following background is taken from the Court's January 6, 2012 Order:

22 In an Order filed September 12, 2011, the Court reviewed the first amended  
23 complaint (FAC) in the instant *pro se* civil rights action filed by Plaintiff, a state

24 \_\_\_\_\_  
25 <sup>1</sup> The Court also previously issued an order to Plaintiff to show cause why the case should  
26 not be dismissed for failure to exhaust his administrative remedies prior to filing this action. Dkt.  
27 74. Plaintiff has since filed responses to the Court's Order to Show Cause. Dkts. 77, 78. However,  
28 the Court now VACATES its Order to Show Cause (dkt. 74) in light of the recent Ninth Circuit  
ruling in *Albino v. Baca*, No. 10-55702, slip op. at 4 (9th Cir. Apr. 3, 2014) (en banc), relating to the  
proper procedural device for raising the issue of exhaustion of administrative remedies. In *Albino*,  
the Ninth Circuit, sitting en banc, overruled *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003),  
which held in part that a claim may be dismissed *sua sponte* if it is clear from the record that the  
prisoner has conceded that he did not exhaust administrative remedies and no exception to  
exhaustion applies. See *Wyatt*, 315 F.3d at 1120. After *Albino*, it is no longer clear whether this is  
still the law of the circuit. Therefore, the Court need not address Plaintiff's responses to the now  
vacated Order to Show Cause.

1 prisoner who has been granted leave to proceed *in forma pauperis*. The Court  
 2 dismissed the FAC, finding that Plaintiff had failed adequately to link Defendants  
 3 to identifiable injuries and had not articulated his claims clearly; that many of  
 4 Plaintiff's claims appeared to be unrelated and Defendants improperly joined under  
 5 Rules 18(a) and 20(a); and that his attempt to seek relief concerning the validity of  
 6 his conviction cannot be pursued in a civil rights complaint.  
 7

8 The Court granted Plaintiff leave to file a second amended complaint (SAC)  
 9 "in which (1) he clearly links each Defendant to the alleged injury or injuries for  
 10 which that Defendant is alleged to be responsible, (2) does not raise unrelated  
 11 claims against different Defendants, and (3) does not challenge the validity of his  
 12 conviction." [Sept. 12, 2011] Order at 5:4-8.  
 13

14 Dkt. 57 at 1.  
 15

16 Thereafter, Plaintiff filed a SAC, in which he sought monetary damages and injunctive relief  
 17 based on (1) alleged injuries caused by employees of the San Francisco Sheriff's Department,  
 18 Plaintiff's criminal attorney and members of the San Francisco Public Defender's Office on  
 19 unspecified dates between 2006 and 2010, when Plaintiff was incarcerated at SFCJ, and (2) alleged  
 20 injuries caused by employees of San Quentin State Prison ("SQSP"), where Plaintiff was later  
 21 transferred.  
 22

23 As noted above, in its September 12, 2011 Order dismissing the FAC with leave to amend,  
 24 the Court explained to Plaintiff that he could not proceed with a complaint containing unrelated  
 25 claims or misjoined defendants. In its January 6, 2012 Order reviewing the SAC, however, the  
 26 Court determined that Plaintiff had alleged two distinct sets of claims against two distinct groups of  
 27 Defendants, specifically, claims against SFCJ employees for events that transpired when Plaintiff  
 28 was incarcerated at the SFCJ between 2006 and 2010, and claims against SQSP employees for  
 events that transpired since Plaintiff was transferred to SQSP in early 2011. The Court found that  
 these two sets of claims were unrelated and that the two groups of Defendants were improperly  
 joined. Accordingly, the Court dismissed the claims against the SQSP Defendants without prejudice  
 from the instant case. The Court further noted that because Plaintiff filed a separate civil rights case  
 against SQSP employees, *see* Case No. C 11-05391 YGR (PR), he "may file an amended complaint  
 in that case to include the SQSP Defendants and the claims against them that have been dismissed  
 from this case." Dkt. 57 at 2. As to Plaintiff's remaining claims in this case relating to his  
 incarceration at SFCJ, the Court determined that they could not proceed as plead because they were  
 29

1 "too conclusory and vague to put any Defendant on notice of his or her alleged actions and the  
 2 resulting constitutional injury." *Id.* The Court reviewed these claims and further instructed Plaintiff  
 3 as follows:

4 In order to survive dismissal for failure to state a claim upon which relief  
 5 may be granted under Rule 12(b)(6), a complaint does not require detailed factual  
 6 allegations; the Supreme Court has made clear, however, that "a plaintiff's  
 7 obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more than  
 8 labels and conclusions, and a formulaic recitation of the elements of a cause of  
 9 action will not do. . . . Factual allegations must be enough to raise a right to relief  
 10 above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-56  
 11 (2007) (internal citations omitted).

12 Here, Plaintiff's allegations concerning the events that transpired when he  
 13 was incarcerated at the [SFCJ] do not adequately show that he is entitled to relief  
 14 under 42 U.S.C. § 1983 because (1) he has not alleged the specific dates on which  
 15 the Defendants' actions caused him injury, other than to state such actions occurred  
 16 between 2006 and 2010, and (2) he has not stated how such actions violated his  
 17 constitutional rights. Without such information, Plaintiff's allegations fail to state a  
 18 claim upon which relief may be granted under § 1983.

19 *Id.* at 3. As Plaintiff was proceeding *pro se*, the Court dismissed the SAC with leave to amend, and  
 20 Plaintiff was granted "one more opportunity to amend his complaint" and to file a TAC stating  
 21 "cognizable claims for relief concerning the events that transpired when he was incarcerated at  
 22 [SFCJ]." *Id.* The Court specifically informed Plaintiff that "an amended complaint supersedes the  
 23 original complaint." *Id.* at 4. It further added as follows:

24 "[A] plaintiff waives all causes of action alleged in the original complaint which are  
 25 not alleged in the amended complaint." *London v. Coopers & Lybrand*, 644 F.2d  
 26 811, 814 (9th Cir. 1981).<sup>2</sup> Defendants not named in an amended complaint are no  
 27 longer defendants. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992).

28 *Id.* (footnote added). Finally, the Court warned Plaintiff that he risked dismissal without prejudice if  
 29 he did not conform with the aforementioned instructions: "If Plaintiff fails to timely file a third  
 30 amended complaint in conformity with this Order, this case will be dismissed without prejudice and

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2 After the Court issued its January 6, 2012 Order, the rule in *London* (that a plaintiff waives all claims alleged in a dismissed complaint which are not realleged in an amended complaint) was overruled in part by the Ninth Circuit in *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012) (en banc). For claims dismissed with prejudice and without leave to amend, the Ninth Circuit held it would not require that they be replied in a subsequent amended complaint to preserve them for appeal. *Id.* at 928. But for any claims voluntarily dismissed, the Ninth Circuit held that it would still consider those claims to be waived if not replied. *Id.* This Court notes that the aforementioned change in law does not affect Plaintiff's case because none of his previous claims were dismissed with prejudice and without leave to amend.

1 will be closed." *Id.* (emphasis in original).

2 As explained below, Plaintiff's TAC is DISMISSED because he has failed to amend the  
 3 claims he originally included in his SAC to correct the aforementioned deficiencies. In addition, he  
 4 has raised unrelated new claims that are not cognizable.

5 **DISCUSSION**

6 **I. Standard of Review**

7 A federal court must engage in a preliminary screening of any case in which a prisoner seeks  
 8 redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C.  
 9 § 1915A(a). In its review the court must identify any cognizable claims, and dismiss any claims  
 10 which are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek  
 11 monetary relief from a defendant who is immune from such relief. *See id.* at 1915A(b)(1), (2). *Pro*  
 12 *se* pleadings must be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
 13 (9th Cir. 1990).

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right  
 15 secured by the Constitution or laws of the United States was violated and (2) that the violation was  
 16 committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48  
 17 (1988).

18 **II. Plaintiff's Claims in TAC**

19 The Court determined that, in his SAC, Plaintiff alleged claims "concerning events that  
 20 transpired at [SFCJ] between 2006 and 2010" that were "too conclusory and vague to put any  
 21 Defendant on notice of his or her alleged actions and resulting constitutional injury." Dkt. 57 at 2.  
 22 Meanwhile, in his TAC, Plaintiff has narrowed down the time frame from between 2006 and 2010 to  
 23 "from 12-23-2009 until 9-22-2010." Dkt. 62 at 3.<sup>3</sup> However, Plaintiff still makes conclusory and  
 24 vague allegations without naming specific Defendants or specific time frames for such violations  
 25 within the aforementioned nine-month period, stating:

26 Between and in that time, the San Francisco Sheriff[']s Department and its Sheriff's

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28 <sup>3</sup> Page number citations refer to those assigned by the Court's electronic case management  
 filing system and not those assigned by Plaintiff.

1                   Jailers tortured Plaintiff[,] kept [him] confined to a 5 by 8 foot cell 24 hrs a day[,]  
 2 did not let Plaintiff go to exercise[,] walk[,] gym as other inmates[,] set Plaintiff up  
 3 in fights with other inmates as they looked for every opportunity to do so[,] did not  
 3 allow Plaintiff to use the law library[,] did not allow Plaintiff to mail any letters out  
 to anyone . . . .

4 *Id.* Plaintiff's TAC names the following Defendants: (1) the City and County of San Francisco;  
 5 (2) Sheriff Michael Hennessey; and (3) Sheriff's Deputies Day and Stealhey. Nowhere in his TAC  
 6 does Plaintiff allege that either Defendants the City and County of San Francisco, Hennessey, Day  
 7 or Stealhey participated in any of the aforementioned violations. Thus, it is apparent that dismissal  
 8 of such claims is warranted because Plaintiff has failed to file a TAC in conformity with the Court's  
 9 January 6, 2012 Order, and because the Court previously warned Plaintiff that the failure to do so  
 10 would result in "this case [being] dismissed without prejudice and . . . closed." *Id.* at 4 (emphasis in  
 11 original).

12 Plaintiff also alleges new unrelated claims. First, he alleges that Defendants Day and  
 13 Stealhey "would give [him] returned envelopes stat[ing] [his] home address could not be found . . ." *Id.* at 5. Plaintiff adds that Defendant Stealhey "told [him] dur[ing] this time of confinement in the  
 14 county jail that [his] relationship with [his] child['s] mother (Miss Dominique) was done [and] that  
 15 [he] and [Miss Dominique] would never live together again and that [he] would never live in San  
 16 Francisco again." *Id.* at 6. Finally, the Court notes that Plaintiff includes additional alleged  
 17 violations in his TAC dealing with "Miss Dominique," stating:

18                   Miss Dominique was being control[led] -- told not to cook for [him,] not to give  
 19 [him] any money[,] not to associate with [his] side of the family[,] to keep [their]  
 20 child away from [his] side of the family and away from [him], to cause [him]  
 21 problems and misery in every way they could to destroy [him] mentally and  
 22 physically com[ing] at [him] in every way they possibly could to get away with it in  
 22 the public's view.

23 *Id.* Plaintiff also points out that from 2006 through 2010 there were "deaths and injuries that had  
 24 happened to the San Francisco Police and Sheriff's Department['s] employees." *Id.* Plaintiff claims  
 25 that "police sheriffs [and] others [were] tak[ing] revenge on [him] because of these deaths and  
 26 injuries [] by supernatural causes." *Id.* To explain why he had been targeted, Plaintiff states as  
 27 follows:

28                   . . . I am Darryl Willingham from the great state of South Carolina who was  
 28 exposed in the media as to being the 2nd coming of Jesus Christ . . . the S.F.

1 Sheriff[']s [Deputies] and others call me a demon, the Antichrist, some evil being  
 2 because of the deaths and injuries.

3 *Id.*

4 **A. Claims Against Defendant Hennessey and the City and County of San Francisco**

5 Plaintiff seems to be suing Defendant Hennessey in his supervisory capacity. Plaintiff does  
 6 not allege facts demonstrating that Defendant Hennessey violated his federal rights, but seems to  
 7 claim Defendant Hennessey is liable based on the conduct of his subordinates, unnamed "Sheriff's  
 8 Jailers" and "Police Sheriff's [Deputies]." *Id.* at 3, 6. There is, however, no respondeat superior  
 9 liability under section 1983 solely because a defendant is responsible for the actions or omissions of  
 10 another. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). A supervisor generally "is only  
 11 liable for constitutional violations of his subordinates if the supervisor participated in or directed the  
 12 violations, or knew of the violations and failed to act to prevent them." *Id.* A supervisor may also  
 13 be held liable if he or she implemented "a policy so deficient that the policy 'itself is a repudiation of  
 14 constitutional rights' and is 'the moving force of the constitutional violation.'" *Redman v. County of*  
 15 *San Diego*, 942 F.2d 1435, 1446 (9th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1074 (1992).

16 Plaintiff's claim against Defendant Hennessey is therefore DISMISSED.

17 Similarly, Plaintiff has not alleged grounds for municipal liability against Defendant City and  
 18 County of San Francisco based on any theory other than that of respondeat superior. This is not a  
 19 sufficient ground for municipal liability. *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691  
 20 (1978) (local governments cannot be liable under section 1983 under respondeat superior theory).  
 21 Accordingly, Plaintiff's claim against Defendant City and County of San Francisco is also  
 22 DISMISSED. Because Plaintiff has previously been given two previous opportunities to amend his  
 23 claims, the Court will not grant him any further leave to amend these claims against Defendants  
 24 Hennessey and the City and County of San Francisco.

25 **B. Claims Against Defendants Day and Stealhey**

26 Prisoners enjoy a First Amendment right to send and receive mail. *Witherow v. Paff*, 52 F.3d  
 27 264, 265 (9th Cir. 1995) (citing *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989)). A prison,  
 28 however, may adopt regulations or practices which impinge on a prisoner's First Amendment rights

1 as long as the regulations are "reasonably related to legitimate penological objectives." *Turner v.*  
 2 *Safley*, 482 U.S. 78, 89 (1987). The *Turner* standard applies to regulations and practices concerning  
 3 all correspondence between prisoners and to regulations concerning incoming mail received by  
 4 prisoners from non-prisoners. *Thornburgh*, 490 U.S. at 413. Here, Plaintiff merely alleges that  
 5 Defendants Day and Stealhey returned undeliverable mail to him on unspecified dates while he was  
 6 incarcerated at SFCJ. Such an allegation fails to rise to the level of a First Amendment violation;  
 7 therefore, Plaintiff's claim against Defendants Day and Stealhey related to his undeliverable mail is  
 8 DISMISSED.

9 Plaintiff's claim of Defendant Stealhey's harassment (relating to the aforementioned  
 10 statements regarding Plaintiff's relationship with "Miss Dominique") is also not cognizable.  
 11 Allegations of verbal harassment and abuse fail to state a claim cognizable under 42 U.S.C. § 1983.  
 12 See *Freeman v. Arpaio*, 125 F.3d 732, 738 (9th Cir. 1997) *overruled in part on other grounds by*  
 13 *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008); *Rutledge v. Arizona Bd. of Regents*, 660  
 14 F.2d 1345, 1353 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983); *see, e.g.*,  
 15 *Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996), *amended* 135 F.3d 1318 (9th Cir. 1998)  
 16 (disrespectful and assaultive comments by prison guard not enough to implicate Eighth  
 17 Amendment); *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (directing vulgar language  
 18 at prisoner does not state constitutional claim); *Burton v. Livingston*, 791 F.2d 97, 99 (8th Cir. 1986)  
 19 ("mere words, without more, do not invade a federally protected right"). Therefore, Plaintiff's claim  
 20 relating to Defendant Stealhey's alleged verbal harassment is DISMISSED without leave to amend.

21 **C. Remaining Frivolous Claims Against Unnamed "Police Sheriff's [Deputies]"**

22 Plaintiff alleges that unnamed "Police Sheriff's [Deputies]" acted to "keep [his] child away  
 23 from [his] side of the family and away from [him] to cause [him] problems and misery in every way  
 24 they could to destroy [him] mentally and physically . . ." Compl. at 6. Plaintiff claims they were  
 25 "tak[.]ing revenge on [him]" because of the "deaths and injuries that had happened to the San  
 26 Francisco and Sheriff's Department employees" from 2006 to 2010." *Id.* It seems that Plaintiff  
 27 believes the unnamed "Police Sheriff's [Deputies]" are blaming him for these "deaths and injuries . . .  
 28 . by supernatural causes" because he claims to be the "2nd coming of Jesus Christ." *Id.*

1       The aforementioned remaining claims fail to allege any constitutional or statutory violations,  
 2 an essential element for a section 1983 claim. The Court further finds that these claims against the  
 3 unnamed "Police Sheriff's [Deputies]" are frivolous and without arguable basis in law.

4       A claim is frivolous if it is premised on an indisputably meritless legal theory or is clearly  
 5 lacking any factual basis. *See Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Although a complaint  
 6 is not "frivolous" within the meaning of sections 1915A and 1915(e)(2) because it fails to state a  
 7 claim under Federal Rule of Civil Procedure 12(b)(6), failure to state a claim is a separate basis for  
 8 dismissal under sections 1915A and 1915(e)(2). *See id.* at 331.

9       Sections 1915A and 1915(e)(2) accord judges the unusual power to pierce the veil of the  
 10 complaint's factual allegations and dismiss as frivolous those claims whose factual contentions are  
 11 clearly baseless. *See Denton v. Hernandez*, 504 U.S. 25, 32 (1992). To pierce the veil of the  
 12 complaint's factual allegations means that a court is not bound, as it usually is when making a  
 13 determination based solely on the pleadings, to accept without question the truth of the plaintiff's  
 14 allegations. *See id.* But, this initial assessment of the plaintiff's factual allegations must be weighted  
 15 in favor of the plaintiff. *See id.* A frivolousness determination cannot serve as a factfinding process  
 16 for the resolution of disputed facts. *See id.* A finding of factual frivolousness is appropriate when  
 17 the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are  
 18 judicially noticeable facts available to contradict them. *See id.* at 32-33. But the complaint may not  
 19 be dismissed simply because the court finds the plaintiff's allegations unlikely or improbable. *See*  
 20 *id.* at 33.

21       Here, even applying the liberal-interpretation standard afforded to *pro se* litigants, the Court  
 22 finds that Plaintiff's allegations rise to the level of the irrational or the wholly incredible, are  
 23 presented in a conclusory manner with no factual support given to substantiate the allegations, and  
 24 are legally and factually frivolous within the meaning of 28 U.S.C. § 1915(d) and *Neitzke*, 490 U.S.  
 25 at 327. Although the Court generally grants leave to amend -- as it has previously granted Plaintiff  
 26 twice before -- it now concludes that here, leave would serve no purpose. Accordingly, the  
 27 remaining claims against the unnamed "Police Sheriff's [Deputies]" are DISMISSED without leave  
 28 to amend.

1 In sum, the TAC does not cure the deficiencies that the Court identified in Plaintiff's SAC.  
2 In addition, the TAC does not state cognizable claims for relief. Therefore, the TAC is DISMISSED  
3 for failure to state a claim upon which relief may be granted. The Court concludes that further leave  
4 to amend would be futile and will not be granted.

## CONCLUSION

6 For the foregoing reasons, the TAC is DISMISSED without further leave to amend, and this  
7 action is DISMISSED.

8       Further, this Court CERTIFIES that any IFP appeal from this Order would not be taken "in  
9 good faith" pursuant to 28 U.S.C. § 1915(a)(3). *See Coppedge v. United States*, 369 U.S. 438, 445  
10 (1962); *Gardner v. Pogue*, 558 F.2d 548, 550 (9th Cir. 1977) (indigent appellant is permitted to  
11 proceed IFP on appeal only if appeal would not be frivolous).

12 The Clerk of the Court shall enter judgment, terminate all pending motions as moot, and  
13 close the file.

14 IT IS SO ORDERED.

15 || DATED: June 12, 2014

Yvonne Gonzalez Rogers  
**YVONNE GONZALEZ ROGERS**  
**UNITED STATES DISTRICT COURT JUDGE**